NO. 80-786

in the Supreme Court of the United States

OCTOBER TERM, 1980

PAUL RASHKIND,*
Assistant State Prosecuting Attorney
for the 11th Judicial Circuit
of the State of Florida
Petitioner,

v.

JUAN A. MARRERO and
MARIA MARRERO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING WRIT

POINT I

Petitioner Rashkind petitions the Supreme Court to grant his Writ of Certiorari on the basis that there is direct conflict with this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976) and other lower court decisions that have followed *Paul*, eg. *Green v. Decamp*, 616 F.2d 368, 370 (8 Cir., 1980); *Cook v. Houston Post*, 616 F.2d 791 (5 Cir., 1980); and the Opinion of the Fifth Circuit Court of Appeal in *Marrero v. City of Hialeah*, 625 F.2d 499 (5 Cir., 1980).

In *Paul*, Davis' suit was one which this Court described as a "classical claim for defamation." *Paul*, *supra*, 424 U.S. at 697, 96 S.Ct. at 1158. Davis did not challenge the validity of his initial arrest or the probable cause to support it. The defamation, therefore, stood "alone and apart from any other governmental action with respect to him." (id. at 694, 96 S.Ct. at 1157) This Court in *Paul* faced the narrow question of whether a citizen's charge of defamation, "standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. §1983 and the Fourteenth Amendment." See, id. at 694, 96 S.Ct. at 1157. This Court held that Davis' reputation alone was neither liberty, nor property for constitutional purposes and, hence, that defamation by the state official, standing alone, was not actionable under §1983. See, id. at 712, 96 S.Ct. at 1165.

This Court's holding in *Paul* was reached through a two-step process. First, the Court held that reputation, standing alone, is not a liberty interest recognized by

Federal Law. See, id., at 700-02, 96 S.Ct. at 1160-61. A federally recognized liberty interest is implicated only when an individual's reputation is stigmatized in connection with the denial of some specific constitutional guarantee or some "more tangible interest." See, id. at 700-01. Second, the Court found that under the applicable state law, reputation was not a liberty or property interest; and, thus, any harm or injury inflicted by the state could not constitute an unconstitutional deprivation of the interest. See, id., at 711-12, 96 S.Ct. at 1165-66.

The Fifth Circuit in *Marrero* clearly and in exhaustive detail demonstrates that *Paul* does not require the dismissal of Respondents' claim of injury to their personal and business reputations because, on at least four independent grounds, the Marrero's claims, unlike those in *Paul*, do involve deprivation of constitutionally protected interest.

a. Injury to reputation caused by the illegal search and seizure. See, id. at 513-514.

b. A protected interest in good will. See, id. at 514-515.

c. Injury to reputation "plus" loss of goodwill. See, id. at 515-516.

d. Injury to reputation "plus" violation of Fourth Amendment rights. See, id. at 516-519.

Petitioner argues here, as in the Circuit Court, that ". . . [T]he mere existence of a cause of action for damages under Florida Law does not, as held by the Fifth Circuit Court of Appeal, create a protected interest

in business reputation. Accordingly, the decision in *Marrero* stands in direct conflict with *Paul* and those lower federal courts that have followed *Paul.*" (Petitioner's brief, p. 11) Florida Law does not categorize business goodwill as "the mere existence of a cause of action for damages;" but, under Florida Law, "[O]ne's business aside from the investment of money and tangible property therein, is in every sense of the word property, and as such, if lawful, entitled to protection from all unlawful interference." *NAACP v. Webb's City, Inc.*, 152 So.2d 179, 182 (Fla., DCA, 1963). Vacated as moot, 376 U.S. 190, 84 S.Ct. 635, 11 L.Ed2d 602 (1964). One's business under Florida Law is property and, therefore, cannot be injured or destroyed by the State without due process of law. It follows that the allegations of Marrero that his property (business reputation) has been destroyed by Petitioner without due process of law conforms precisely with the pronouncements of *Paul. Marrero, supra*, 625 F.2d at 513. See footnote 17, 18.

The remainder of the Petitioner's brief on Point I concerns itself with the Fifth Circuit Court of Appeal "Stigma Plus" analysis, and in so doing, totally ignores the existence of *Owen v. City of Independence*, _ U.S. _, 100 S.Ct. 1398, 63 L.Ed2d 673 (1980) and the Circuit Court's use of this case to reach its decision.

Unlike the libel in *Paul*, the defamation in *Marrero* did not stand alone. Rather, accepting Marrero's allegations as true, the defamation was intimately connected with the unlawful arrest of the Marreros and the unlawful search and seizure of practically the entire inventory of their store. ". . . Hence, the issue, is whether the nexus between the defamation and the unlawful conduct is sufficient to satisfy the stigma-plus

test of *Paul* so that the Appellant's personal and business reputations rise to the level of protected liberty interest." *Marrero, supra*, 625 F.2d at 517.

Relying on the analysis of *Roth* by the Supreme Court in *Paul*, the Fifth Circuit had held that "stigma to reputation in conjunction with a failure to rehire" states a claim under §1983, even though the defamatory statements did not cause the refusal to rehire. *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338 (5 Cir., 1978).

The Circuit Court then concluded that their *Dennis* decision was correct because, *Marrero, supra*, at 518: "Our reading of *Paul* that the defamation need not cause the deprivation of another interest in order for a liberty interest to be implicated was recently confirmed by the Supreme Court in *Owen v. City of Independence*, ___ U.S. ___, 100 S.Ct. 1398, 63 L.Ed2d 673 (1980)."

The Circuit Court then throughly discusses and analyzes *Owen*, *Paul*, *Roth*, and *Wisconsin v. Constanteneau* and concludes, *Marrero, supra*, at 519:

> "Hence, it is now apparent that the defamatory communication need not cause the loss of the protected right or more tangible interest, in order to satisfy the stigma-plus requirement of *Paul*. Instead, it is sufficient that the defamation occur in connection with, and be reasonably related to, alteration of the right or interest."

Applying its analysis and conclusions to the facts of *Marrero*, the Circuit Court found that since the

defamation alleged here occurred in connection with the alleged violation of the Marreros' Fourth Amendment rights, the injury to the Marreros personal and business reputations constitutes the deprivation of liberty interest. See, id. at 519.

It is crystal clear in *Owen* that the defamation need not cause the deprivation of another interest in order for a liberty interest to be implicated. See *Owen v. City of Independence*, ___ U.S. ___, ___ N13, 100 S.Ct. 1398, 1406 N.13, 63 L.Ed.2d 673 (1980). The Circuit Court compares *Owen* to the facts of *Marrero* and notes the similarity. *Marrero, supra*, 625 F.2d at 519.

It follows then, when Petitioner argues in its Petition to this Court, "[T]he nexus between any injury to reputation and the search and seizure is speculative at best . . .", Petitioner's brief, p. 13, and, ". . . [T]he mere fact that the search and seizure occurred in the same period would be insufficient for purposes of qualifying as a protected liberty interest in the absence of some substantial causal connection. . . .", Petitioner's brief, p. 13, that it is completely oblivious to this Court's decision in *Owen* and to the allegations in the Marrero complaint.

In the Marrero complaint, paragraphs 11 through 15 [See Appendix to Petitioner's brief, App. p. 54-55], it is alleged that the Hialeah Police and the Petitioner, State Attorney Rashkind, illegally seized over 800 items of jewelry of the approximate value of $75,000.00 and arrested the Marreros for receiving stolen property. That this entire proceeding was photographed by camera crews of all the local television channels which had arrived simultaneously with the police and Rashkind;

that contemporaneous with the illegal seizure and unlawful arrest of the Marreros, the Hialeah Police Department and the Petitioner, State Attorney Rashkind, announced to the assembled T.V. news media that over $75,000.00 in stolen property had been recovered and that the Marreros had been arrested for this crime; that all of the foregoing, including pictures of the Marreros and of the Petitioner, State Attorney Rashkind, making this statement, was shown on all local T.V. news shows in the Metropolitan Dade County, Florida area.

It flys in the face of common sense and reason to say under the allegations of the Marrero complaint that the "nexus between any injury to reputation and the search and seizure is speculative at best."

It is almost inconceivable that a hypothetically manufactured factual allegation could demonstrate a more "substantial causal connection" between injury to reputation and the search and seizure allegations in this case.

The Fifth Circuit Court of Appeal's decision in *Marrero* does not conflict with this Court's opinion in *Paul* on any issue.

POINT II

Petitioner, Rashkind, states in his petition that conflict exists between this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and the Fifth Circuit's opinion in *Marrero*.

In *Marrero*, the prosecutor, as alleged in the complaint, physically participated in the execution of the search warrant, being on the premises during the search, directing the alleged unconstitutional activities of the police officers, and then appearing on television at the scene of the search to announce the arrest of the Marreros and the harvest of the alleged illegal search and seizure. [Petitioner's brief, App. p. 54-55] These are not the acts of an advocate, immunized by *Imbler*, but that of a prosecutor functioning primarily as an investigator; or more accurately, the prosecutor in this case was acting as a high-ranking police officer.

Respondents rely upon the Opinion of the Fifth Circuit on this issue, without further comment.

CONCLUSION

No grounds for granting the Writ of Certiorari having been demonstrated, it is respectfully submitted that the Writ be denied.

Respectfully submitted,

JOSEPH C. BRANNEN
Attorney for Respondents,
Juan A. Marrero & Maria Marrero

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Rule 33(1), Supreme Court Rules, that three (3) true and correct copies of Respondents' Response to Petition for Writ of Certiorari to the Supreme Court of the United States were delivered this ____ day of January, 1981, upon:

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Such service is in accordance with Rule 33(3), Supreme Court Rules.

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